IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
November 27, 2007 Session

STATE OF TENNESSEE v. MARSHALL A. BRABSON

Direct Appeal from the Criminal Court for Knox County
No. 81148 Ray L. Jenkins, Judge

No. E2006-02698-CCA-R3-CD - Filed February 20, 2008

A Knox County Criminal Court jury convicted the appellant, Marshall A. Brabson, of attempted voluntary manslaughter and being a felon in possession of a handgun, and the trial court sentenced him to concurrent sentences of seven and three years, respectively. On appeal, the appellant contends that (1) the evidence is insufficient to support his convictions; (2) the trial court erred by allowing the appellant to represent himself at trial; (3) the trial court erred by limiting the appellant's cross-examination of defense witnesses and by excluding the testimony of some witnesses; (4) the trial court erred by refusing to allow the appellant to play a video disc recording for the jury; and (5) his sentences are excessive. Based upon the record and the parties' briefs, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which ALAN E. GLENN and D. KELLY THOMAS, JR., JJ., joined.

Leslie M. Jeffress, Knoxville, Tennessee, for the appellant, Marshall A. Brabson.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; Randall E. Nichols, District Attorney General; and William Jeff Blevins, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

The victim, Summer Hayes, testified at trial that she was twenty-five years old. In December 2004, she was the appellant's girlfriend and had known him for a couple of months. The victim was addicted to crack cocaine, and the appellant would provide her with crack. On the afternoon of December 20, 2004, the victim was at the appellant's home at 3408 Argyle Drive in Knoxville. She had been using crack cocaine that day, and the appellant had been drinking alcohol. The victim and

the appellant got into an argument about drugs, and the victim told the appellant she was going to "rehab." The victim walked out of the room to make a telephone call and was planning to leave the appellant's home. When she walked back into the room, she turned around and heard a loud noise. The victim fell down and realized that the appellant had shot her in the left buttock. The bullet exited the victim's thigh.

The victim testified that after the shooting, the appellant said, "I told you not to f*** with me, bitch." The victim begged the appellant to take her to the hospital, but he allowed her to remain on the floor for fifteen to twenty minutes before he put her into his van. The appellant then went back into his home for seven to ten minutes. While he was inside, the victim saw one of his neighbors outside and asked her to telephone the police. The appellant came out of his home and drove the victim "down the road." The police began following the appellant, and the victim told him to pull over and let her out of the van. When the van came to a four-way stop, the appellant said he was going to kill them both and put a gun to his head. The victim pulled the gun away from the appellant and jumped out of the van. The police ordered the victim to drop the gun, and the appellant drove away. The police stayed with the victim until an ambulance arrived and took her to the hospital. The victim stated that she was in the hospital for about one week and that she still had pain as a result of the shooting.

On cross-examination, the victim testified that after the shooting, she spent twenty-eight days in a drug treatment program and currently was not addicted to any drugs. She stated that she had been at the appellant's home for a couple of hours before the shooting and that she had not seen the appellant with a gun. The appellant had never hit the victim previously but had consumed a lot of alcohol on December 20 and shot her because he was upset that she was going to leave his house. The victim denied ever engaging in prostitution but acknowledged she had been arrested previously for possession of drug paraphernalia. She denied knowing anyone named Tiffany Sharp or Steven Drew.

Officer Shane Watson of the Knoxville Police Department (KPD) testified that on the afternoon of December 20, 2004, he was dispatched to the appellant's home in response to a report that a woman had been shot. Dispatch later reported that the suspect and the victim were leaving the residence in a red van. As Officer Watson approached the intersection of Boyds Bridge Pike and McDonald Road, a red minivan ran a stop sign and proceeded through the intersection. Officer Watson began following the van, which pulled into a church parking lot on Brooks Avenue. Officer Watson turned on his emergency lights and saw that the appellant was driving the van. The appellant pulled out of the parking lot and continued traveling on Brooks Avenue, and Officer Watson turned off his patrol car's emergency lights. When the van stopped at an intersection, the passenger got out and was holding a gun. Officer Watson stopped his patrol car, got out, and ordered the passenger to drop the gun. The passenger had blood on her pants and dropped the weapon. The van continued through the intersection, and Officer Watson followed it. The appellant stopped the van, and officers arrested him.

On cross-examination, Officer Watson testified that after the appellant finally stopped the

van, the appellant was compliant and officers had no trouble arresting him. Officers did not find any drugs or weapons on the appellant, and Officer Watson transported him to an interview room at the police department. There, the appellant urinated in a trash can and fell asleep. Based on the appellant's behavior, officers believed he was intoxicated with alcohol or drugs. The appellant had a lot of blood on his shirt and initially claimed the victim shot herself.

KPD Officer Adam Wilson testified that he joined Officer Watson's chase of the appellant's van on December 20, 2004, and was driving behind Officer Watson's patrol car. As Officer Wilson approached an intersection, he saw the victim standing on the street. She was holding her hip and appeared to be in pain. A black pistol was laying on the street, and Officer Wilson parked his patrol car over the weapon to protect it. Officer Wilson later removed the magazine from the pistol and noticed the magazine contained seven rounds. On cross-examination, Officer Wilson testified that he never saw the appellant with the gun.

Janice Gangwer testified that on December 20, 2004, she was a criminalist with the KPD's forensic unit. She took photographs at the intersection of Brooks Avenue and Wilder Place and recovered a black pistol. Gangwer also went to the appellant's home and collected a spent shell casing that was laying on the floor in a back bedroom of the house. A bullet hole was in the door of the room, and a bullet was embedded in the door.

KPD Investigator Shane Cooper testified that on January 10, 2005, he executed a search warrant on the appellant's house. A bullet was removed from a door in the home.

The appellant called several witnesses to testify on his behalf. Tracy Myers testified that she had known the victim for about two years because the victim "used to be a working girl on the streets," meaning the victim was a prostitute. Sherri Turpin testified that she knew the victim "from the East Side . . . and using drugs from the streets." On cross-examination, Turpin acknowledged having prior convictions for theft, prostitution, criminal impersonation, driving under the influence, and child endangerment. Trisha Jenkins testified that she knew the victim and that she and the victim "were with men before." On cross-examination, Jenkins acknowledged having a prior conviction for solicitation of prostitution but denied any prior convictions for drug possession. Leanna Hancock testified that she was the appellant's friend. On cross-examination, she acknowledged having prior convictions for drug possession and shoplifting. Although the appellant had been charged with attempted second degree murder and being a felon in possession of a weapon, the jury convicted him of the lesser included offense of attempted voluntary manslaughter and the latter offense.

II. Analysis

A. Evidence Insufficient

The appellant contends that the evidence is insufficient to support the convictions because the victim was not credible, rendering the verdict "unreliable and capricious." The State contends

that the evidence is sufficient. We agree with the State.

When an appellant challenges the sufficiency of the convicting evidence, the standard for review by an appellate court is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); Tenn. R. App. P. 13(e). The State is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions concerning the credibility of witnesses and the weight and value to be afforded the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact. State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). This court will not reweigh or reevaluate the evidence, nor will this court substitute its inferences drawn from the circumstantial evidence for those inferences drawn by the jury. Id. Because a jury conviction removes the presumption of innocence with which a defendant is initially cloaked at trial and replaces it on appeal with one of guilt, a convicted defendant has the burden of demonstrating to this court that the evidence is insufficient. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

The only claim the appellant makes regarding this issue is that the evidence is insufficient because the victim was not credible. However, the victim testified that she and the appellant argued about drugs on December 20, 2004, and that she decided to go to "rehab." She also stated that when she told the appellant she was going to leave his home, he became angry and shot her in the left buttock. Moreover, the State introduced photographs into evidence showing the victim's gunshot wound and showing her receiving medical treatment. The jury, as was its prerogative, obviously accredited the victim's testimony. We conclude that the evidence is sufficient to support the appellant's convictions.

B. Self-Representation

The appellant argues that the trial court erred by allowing him to represent himself at trial. He contends that the court did not question him adequately pursuant to Tennessee Rule of Criminal Procedure 44 in order to ensure that he knowingly and intelligently waived his right to counsel. The State claims that the trial court properly questioned the appellant and ascertained that he could represent himself at trial. We agree with the State.

The United States Constitution and the Tennessee Constitution guarantee an indigent defendant the right to be represented by appointed counsel during a criminal trial. See U.S. Const. amend. VI; Tenn. Const. art. I, § 9. Likewise, "[j]ust as there is the right to the assistance of counsel at trial, there is the alternative right to self-representation." State v. Gillespie, 898 S.W.2d 738, 740 (Tenn. Crim. App. 1994); see also Faretta v. California, 422 U.S. 806, 819-20, 95 S. Ct. 2525, 2533 (1975); State v. Small, 988 S.W.2d 671, 673 (Tenn. 1999). "The right to represent oneself, however, should be granted only after a determination by the trial court that the defendant is both knowingly and intelligently waiving the valuable right to assistance of counsel." Small, 988 S.W.2d at 673.

There are three essential prerequisites to activating the right of self-representation. First, the right to proceed pro se must be timely asserted. State v. Herrod, 754 S.W.2d 627, 629 (Tenn. Crim. App. 1988). Second, the defendant's request to proceed pro se must be clearly and unequivocally made. Id. at 630. Finally, the "accused must knowingly and intelligently waive the right to the assistance of counsel." Id. Additionally, we note that Rule 44(b)(2) of the Tennessee Rules of Criminal Procedure provides that indigent defendants shall execute a written waiver of counsel. On appeal, the appellant only contends that his waiver of the right to counsel was not knowing and intelligent.

Initially, we note that a written waiver of the appellant's right to counsel is in the appellate record. A transcript of the hearing in which the appellant asked to represent himself also is in the record. During the hearing, which occurred on Friday, February 10, 2006, the appellant's attorney requested to withdraw because he and the appellant were "having difficulty communicating with each other." The trial court stated that the appellant had "gone through three lawyers so far" but allowed counsel to withdraw. The trial court asked another lawyer in the courtroom, Leslie M. Jeffress, if he "might be able to help" the appellant, and Jeffress stated, "I'd be happy to do that, your Honor." The trial court then told the appellant that "if you don't cooperate with this attorney, represent yourself," and the appellant said, "I'd like to represent myself, sir." The trial court then questioned the appellant, advised the appellant that it was unwise for him to represent himself, and asked if he still desired to do so. The appellant answered, "Yes, sir." The trial court ruled that the appellant had knowingly and voluntarily waived his right to counsel and noted that the appellant's trial was scheduled to start on Monday, February 13.[1] We must determine whether the appellant knowingly and intelligently waived his right to counsel.

Before a trial court accepts a defendant's waiver of counsel, the court must "advise the accused in open court of the right to the aid of counsel at every stage of the proceedings . . . and . . . determine whether there has been a competent and intelligent waiver of such right by inquiring into the background, experience, and conduct of the accused, and other appropriate matters." Tenn. R. Crim. P. 44(b)(1). In order to determine the knowing nature of the defendant's waiver, this court has suggested that trial courts follow the guideline questions contained in 1 Bench Book for United States District Judges 1.02-2 to -5 (3d ed. 1986). Smith v. State, 987 S.W.2d 871, 875 & appendix (Tenn. Crim. App. 1998) (quoting the suggested line of questioning from the Bench Book). Additionally, the United States Supreme Court has instructed as follows:

> [A] judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder,

[1] The record reflects that the trial did not start until February 21, 2006.

> possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.

Von Moltke v. Gillies, 332 U.S. 708, 723-24, 68 S. Ct. 316, 323 (1948).

We conclude that the trial court substantially complied with the suggested format in the federal guidelines. The trial court asked the appellant if he had ever studied the law, asked if he had ever represented himself or another defendant in a criminal action, and informed him of the charges against him. The court asked the appellant if he realized that he could be ordered to serve the sentences for the crimes consecutively, that he would have to represent himself on his own, and that the trial court could not advise him. The trial court then asked the appellant if he was familiar with the Tennessee Rules of Evidence and Criminal Procedure and informed him that he would have to abide by the rules. Finally, the trial court told the appellant that if he decided to testify, he had to ask himself questions and could not "just tell your story." The court concluded its colloquy with the appellant by advising against self-representation because the appellant was not familiar with the Rules of Evidence or court procedure and by asking if he still wished to proceed pro se despite all the "difficulties." The appellant said yes. This line of questioning was almost identical to the line of questioning quoted from the guidelines for federal judges. Although the trial court did not inform the appellant of the potential punishment for each charged crime as recommended in the guidelines, it asked the appellant if he understood the penalties for the offenses, and the appellant said, "Yes, sir." We conclude that the appellant knowingly and intelligently waived the right to the assistance of counsel at trial.

C. Cross-examination of Defense Witnesses

Next, the appellant contends that the trial court erred by limiting his cross-examination of defense witnesses pursuant to "hearsay and other procedural rules" and by prohibiting some defense witnesses from testifying. He contends that due to his unfamiliarity with the "mechanics of presentation," the trial court should have given him more leeway in presenting his defense. The State contends that the appellant has waived this issue because he failed to cite to relevant authority, failed to cite to relevant parts of the record, and failed to develop his argument. We agree with the State. In addition to failing to cite to authority, the appellant has failed to specify which defense witnesses or rulings by the trial court he is challenging. Therefore, this issue has been waived. See Tenn. R. App. P. 27(a)(7); Tenn. Ct. Crim. App. R. 10(b).

D. Video Disc

Next, the appellant contends that the trial court erred by refusing to allow him to play a video disc for the jury, allegedly showing the police chasing the appellant's van and arresting him. He

argues that the reason the trial court refused to allow him to play the disc was because he was unaware of how to authenticate the recording properly in order to have it admitted into evidence and that the trial court should have given "some leeway to appellant's attempt to authenticate and play it, especially since appellant had advised the court that the video shown [to] the jury was not the original or was incomplete." The State contends that the trial court's ruling was proper because the appellant did not authenticate the disc. We agree with the State.

During Officer Watson's testimony, the State played a video disc showing a recording from Officer Watson's patrol car as he chased the appellant's van and arrested the appellant. While the disc played for the jury, Officer Watson narrated the events on the recording. At some point, the appellant objected to the jury's seeing the recording. The appellant told the trial court that the disc recording was not the original and had been altered. He then stated that "[t]he original tape shows the van actually pulling into the church parking lot, your Honor, and shows the -- the van stopped with the door open and with the officer there. This does not show that. This is not the original tape." The trial court ordered the jury out of the courtroom, and the State asked Officer Watson if the disc was the original recording of his chasing the appellant. Officer Watson stated, "I don't know that this is the actual tape that was in my car, but this is an exact . . . duplicate of the original tape, unaltered." The appellant maintained that the recording was not an original and requested to have a second disc introduced into evidence. The appellant explained that his most recent attorney had the second disc. The State informed the trial court that the attorney was present in the courtroom and that the attorney was welcome to explain any differences between the disc currently being played for the jury and the second disc in the attorney's possession. The attorney stated, however, that "[i]t all occurred during an attorney-client communication, your Honor. I don't feel comfortable talking about it." The trial court ruled that the disc currently being played for the jury was authentic and ordered the attorney to turn over the second disc to the appellant.

When the jury returned to the courtroom, the State finished playing the first disc. During the appellant's cross-examination of Officer Watson, the appellant requested to play the second disc for the jury. The trial court ruled that the appellant could not play the disc because he did not have anyone to authenticate it. On appeal, the appellant argues that Officer Watson probably could have authenticated the disc recording if the appellant had been aware "of the mechanics of authentication."

The admissibility of a relevant videotape is within the trial court's sound discretion, and this court will not overturn its ruling on the admissibility of such evidence without a clear showing of abuse of discretion. State v. Van Tran, 864 S.W.2d 465, 477 (Tenn. 1993); State v. Teague, 645 S.W.2d 392, 397 (Tenn. 1983). Authentication is a prerequisite to a videotape's admissibility. See Tenn. R. Evid. 901(a). The trial court warned the appellant about the pitfalls of self-representation. Given that the appellant did not attempt to authenticate the video disc he wanted to introduce, the trial court did not err by refusing to allow him to play the disc for the jury. In any event, the appellant made no offer of proof regarding the video disc and did not include the disc in the appellate record. See Tenn. R. App. P. 36(a). Moreover, he does not allege how the excluded evidence would have changed the outcome of his case, and his appellate brief acknowledges that "[w]hether this video could have helped appellant at trial is unknown." See Tenn. R. App. p. 36(b). We conclude

that he is not entitled to relief.

E. Excessive Sentences

Finally, the appellant contends that the trial court erred by applying enhancement factors that were not admitted by him or found by a jury in violation of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004). The State argues that the appellant's sentences are not excessive. We agree with the State.

At the appellant's sentencing hearing, no witnesses testified, but the appellant gave a statement on his own behalf. He stated that the victim was his girlfriend at the time of the shooting, that he loved her, and that he was sorry she was hurt. He also stated that he had tried to get her to seek treatment for her drug problem, that he did everything he could after the shooting to get her to the hospital quickly, and that he "complied with the police in every manner that [he] could." The State noted that the appellant had prior felony convictions for aggravated rape, burglary, and assault with intent to commit rape. It argued that the appellant was a Range II, multiple offender and that his sentences should be enhanced within the range based upon the prior conviction for aggravated rape. The State also argued that the trial court should enhance the appellant's sentences because he allowed the victim to be treated with exceptional cruelty, the personal injuries sustained by the victim were particularly great, and the appellant used a firearm during the commission of the offenses. The State also requested that the trial court order consecutive sentencing.

The trial court ruled that the appellant was a Range II, multiple offender. Therefore, his range of punishment for the attempted voluntary manslaughter conviction, a Class D felony, was four to eight years, and the range of punishment for his being a felon in possession of a weapon conviction, a Class E felony, was two to four years. See Tenn. Code Ann. § 40-35-112(b)(4), (5). The trial court noted that it was required to consider the evidence at the trial and sentencing hearing; the presentence report, "which is a matter of record or if it is not, it should be"; the principles of sentencing; and arguments regarding sentencing alternatives. According to the appellant's brief, the court applied enhancement factors (1), that the "defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range"; (5), that the "defendant treated, or allowed a victim to be treated, with exceptional cruelty during the commission of the offense"; and (9), that the "defendant possessed or employed a firearm . . . during the commission of the offense." Tenn. Code Ann. § 40-35-114(1), (5), (9) (2006). Our review of the sentencing hearing transcript indicates that the trial court also applied enhancement factor (6), that the "personal injuries inflicted upon . . . the victim [were] particularly great." Tenn. Code Ann. § 40-35-114(6) (2006). The trial court applied no mitigating factors. It enhanced the appellant's sentence for the attempted voluntary manslaughter conviction to seven years, and it enhanced the appellant's sentence for the being a felon in possession of a weapon conviction to three years. The court ordered the appellant to serve the sentences concurrently.

The appellant contends that Blakely prohibited the trial court from enhancing his sentences. The State argues that because the appellant did not object under Blakely at the sentencing hearing,

he has waived this issue and that, in any event, the appellant's prior criminal history justifies his sentences. We initially note that it does not appear that either party introduced the appellant's presentence report into evidence at the sentencing hearing. Yet, the trial court's stating that the presentence report should be made a part of the record indicates that it considered the report. Nevertheless, the report is not in the appellate record. It is the appellant's duty to prepare a fair, accurate, and complete record on appeal to enable meaningful appellate review. See Tenn. R. App. P. 24(a). The presentence report is a necessary part of this court's review, and without it, we must presume that the sentences imposed are correct. See State v. Beech, 744 S.W.2d 585, 588 (Tenn. Crim. App. 1987).

In any event, the record before us supports the sentences imposed by the trial court. Blakely prohibits the enhancement of sentences based upon considerations that have neither been admitted by a defendant nor determined by a jury beyond a reasonable doubt. See Cunningham v. California, 549 U.S. ___, 127 S. Ct. 856 (2007); State v. Gomez, ___ S.W.3d ___, No. M2002-01209-SC-R11-CD, 2007 Tenn. LEXIS 884 (Nashville, Oct. 9, 2007). However, the application of enhancement factor (1), which was based upon one of the appellant's prior felony convictions, does not violate Blakely. In our view, the appellant's prior conviction for aggravated rape alone is entitled to significant weight and supports the trial court's enhancing his sentences to seven and three years. We also note that the appellant has taken little to no responsibility for his actions in this case, claiming that he encouraged the victim to seek treatment for her drug addiction and did everything he could to help her after the shooting. This reflects poorly on his potential for rehabilitation. We conclude that his prior criminal history and poor potential for rehabilitation justify his effective seven-year sentence.

III. Conclusion

Based upon the record and the parties' briefs, we affirm the judgments of the trial court.

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NORMA McGEE OGLE, JUDGE